Tentative Rulings for June 14, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG02003 ***Johnson et al. v. Cal. Dept. of Trans.*** **is continued to Tuesday, June 21, 2016 at 3:30 p.m. in Dept. 501**

16CECG01271 ***Everbank Commercial Finance, Inc. v. Sohan Singh*** **is continued to Wednesday, August 3rd, 2016 at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(6)

Tentative Ruling

Re: ***Meza v. Chimienti***
Superior Court Case No.: 16CECG00736

Hearing Date: June 14, 2016 (**Dept. 402**)

Motion: Demurrer by Defendant Saverio Chimienti

Tentative Ruling:

To overrule, with Defendant granted 10 days' leave to answer. The time in which the complaint can be answered will run from service by the clerk of the minute order.

Explanation:

The complaint states a valid cause of action for conversion. (Code Civ. Proc., § 430.10, subd. (e).)

In ruling on a demurrer, the court can consider only matters that appear on the face of the complaint or matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) No other extrinsic evidence can be considered. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.) Consequently, the Court cannot consider the declaration of attorney Lance Armo.

Even if Defendant Saverio Chimienti requested that the Court judicially notice the prior judgment attached to Mr. Armo's declaration, which it has not, there is insufficient information in the judgment from which the Court could conclude this action is barred by the doctrine of res judicata. While it is generally true that a court may take judicial notice of a judgment and other court records and decide the question of whether or not res judicata bars the current action on demurrer, the court cannot do so where the facts are not alleged in the complaint or in the matters judicially noticeable. (*Willson v. Security-First National Bank of Los Angeles* (1943) 21 Cal.2d 705, 710.)

The determination of whether res judicata applies can be made by a comparison of the substance of the complaints in the two actions, reading the complaints as a whole and their parts in their context. (*Weickel v. TCW Realty Fund Holding Company, Inc.* (1997) 55 Cal.App.4th 1234, 1247-1248.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 6/13/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Millennium Acquisitions, LLC v. Levinson***

Case No. 15CECG01815

Hearing Date: June 14, 2016 (Dept. 402)

Motion: By Defendants Levinson and West Coast CASp and ADA Services, Inc. for attorney's fees pursuant to Code of Civil Procedure §425.15, subdivision (c).

Tentative Ruling:

To grant the motion for attorney's fees. The Court awards $13,749.00 in fees.

Explanation:

In any action subject to [a special motion to strike], a prevailing defendant . . . shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc. § 425.16, subd. (c).) The right to recover fees and costs extends to those incurred on appeal. (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 287 ["appellate courts have construed section 425.16, subdivision (c), to include an attorney fees award on appeal"]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.) The award of attorney fees and costs under section 425.16, subdivision (c), is mandatory. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.)

Timeliness

Plaintiffs initially argue that, because an action is normally stayed pending appeal, the motion for attorneys' fees should not be heard. However, Defendants correctly point out that motions for attorney's fees and for costs can be heard insofar as they do not affect the judgment. (*See Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368-69.) Therefore, the Court will consider the merits of this motion.

Calculating the Fees – The Lodestar

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the "careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48.) Here, Defendants seek a loadstar of $41,009.00. As the Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate."

(*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (italics added); *Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts." (*Serrano III*, *supra*, 20 Cal.3d at p. 48, fn. 23.)

1. Number of Hours Reasonably Expended

While the fee awards should be fully compensatory, the trial court's role is not to simply rubber stamp the defendant's request. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361.) Rather, the court must ascertain whether the amount sought is reasonable. (*Robertson v. Rodriguez*, *supra*, 36 Cal.App.4th at p. 361.) However, while an attorney fee award should ordinarily include compensation for all hours reasonably spent, inefficient or duplicative efforts will not be compensated. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.)

The court in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. (1995) 39 Cal.App.4th 1379 considered the legislative history of the anti-SLAPP statute and concluded a fee award was meant to compensate only for the fees incurred for the anti-SLAPP motion itself. (*Id*. at pp. 1381, 1383.) This holding has been slightly expanded, to the extent that it has been interpreted to mean that a prevailing defendant is entitled to fees "incurred in connection with" the anti-SLAPP motion. (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15, 21; *Metabolife International, Inc. v. Wornick* (S.D.Cal.2002) 213 F.Supp.2d 1220, 1223.)

"The fees awarded should include services for all proceedings, including discovery initiated by the opposing party pursuant to [Code of Civil Procedure] section 425.16, subdivision (g), directly related to the special motion to strike." (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 92.) A fee award under the anti-SLAPP statute may not include matters unrelated to the anti-SLAPP motion, such as "attacking service of process, preparing and revising an answer to the complaint, [or] summary judgment research." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1325.) Similarly, the fee award cannot include fees for "obtaining the docket at the inception of the case" or "attending the trial court's mandatory case management conference," as such fees "would have been incurred whether or not [the defendant] filed the motion to strike." (*Ibid*.) In short, the award of fees is designed to "'reimburs[e] the prevailing defendant for expenses incurred in *extracting* herself from a baseless lawsuit'" (*Wanland*, *supra*, 141 Cal.App.4th at p. 22, italics added), not to reimburse the defendant for all expenses incurred in the baseless lawsuit.

Defendants are correct that there is authority for the proposition that recovery of attorneys' fees can include those expended on other motions, such as a demurrer, when the motions pose issues that are substantially the same. (*Kearney v. Foley & Lardner* (S.D.Cal.2008) 553 F.Supp.2d 1178, 1184.) However, as noted above, Defendants cannot recover for "duplicative" work. (*Christian Research Institute, supra,* 165 Cal.App.4th at 1321.) Here, the legal arguments in the demurrer were duplicative of those in the Anti-SLAPP motion and rewarding Defendants for such work would be

"duplicative." Therefore, while the Court will not reduce for entries in which both the demurrer and anti-SLAPP motion were researched or discussed, the Court will not award fees for work expended on the demurrer separately.

Moreover, the fees for the demurrer for the initial complaint are simply not related to the Anti-SLAPP motion because it was directed to a separate pleading. Thus, Defendants are not entitled to fees for work done related to the initial complaint. Likewise, Defendants have presented no evidence or argument that the work related to the status conferences or discovery is "substantially" or "directly" related to the Anti-SLAPP Motion (especially since it does not appear that the parties conducted discovery pursuant to Code of Civil Procedure §425.16, subdivision (g)). Therefore, the Court will not consider those hours as part of hours reasonably expended.

The Court also rejected entries where it was unclear if the work was done for the Anti-SLAPP Motion. The Court also rejected entries for work on the costs memorandum and the motion to tax costs.

The Court will, however, include the number of hours worked on the motion for reconsideration, since that motion was directed towards the ruling on the Anti-SLAPP motion and are therefore fees that Defendants incurred as a result of filing the motion to strike.

Finally, in the reply brief, Defendants for the first time sought fees for the work done on the present motion and for their potential appearance at the hearing on this motion. Since this was presented without authority and not until the reply brief, the Court will not award any such fees.

The Court therefore finds that the reasonable number of hours of work Mr. E. LeRoy Falk performed for which Defendants can be compensated for working on the Anti-SLAPP motion was 16.8 hours. The reasonable number of hours of work Ms. Sacks performed for which Defendants can be compensated is 49.1 hours.

2. Reasonable Hourly Compensation

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type" (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133.) Ordinarily, "'the value of an attorney's time . . . is reflected in his normal billing rate.'" (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 761.) Here, counsel for defendants has presented his declarations to the effect that his normal billing rate is $400 per hour. However he is asking for $380 per hour in this motion. The declaration also sets the "regular" fee for the paralegal at $175.00 per hour, but states he will only seek $150.00 per hour (though entries after January 19, 2016 seek the larger sum; the Court will reduce that in its calculation).

In opposition, Plaintiffs argue that the rates sought are too high given the experience of counsel and the prevailing rates. However, Plaintiffs cited to no declarations or expert testimony to support this contention. Plaintiffs also cited to an unreported federal case in which Ms. Sacks' rate was listed as $115 per hour for work on

a default matter. Plaintiffs cited to no authority for how that case is binding on this Court's determination. Therefore, the Court finds that the rates sought by Defendants for work performed by counsel and the paralegal are reasonable.

As a result, Mr. Falk can be compensated for 16.8 hours at a rate of $380 per hour for a total of $6,384.00. Ms. Sacks can be compensated for 49.1 hours at a rate of $150.00 for a total of $7,365.00. Therefore, the Court awards a total of $13,749.00.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 6/13/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Sociedad Progresista Mexicana, "Justo Sierra" Logia 30, by and through Esteban Santos, in his official capacity as Second Vice President of the Sociedad Progresista Mexicana, Justo Sierra Logia 30 et al. v. Rosendo Robles, Emma Mendez, Roberto Peralta, Lucy Gonzalez and Beatrice Ochoa***
Superior Court Case No. 15 CECG 03576

Hearing Date: June 14, 2016 (**Dept. 402)**

Motion: Preliminary Injunction

Tentative Ruling:

To take the hearing off calendar.

Explanation:

A party requesting a preliminary injunction may give notice of the request to the opposing or responding party either by serving a noticed motion under Code of Civil Procedure section 1005 or by obtaining and serving an order to show cause (OSC). [CRC Rule 3.1150] Here, the Plaintiffs opted to use the noticed motion procedure. As a result, proof of service in compliance with CCP §1005 should accompany the moving papers. If filed separately, the proof of service must be filed at least *5 court days* before the hearing. [CRC 3.1300(c)] But, no proof of service of the motion on the Defendants' attorney has been filed. Therefore, the motion will be taken off calendar.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 6/13/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Arteaga v. Fresno Community Regional Medical Center ("Arteaga/Perez")***
Court Case No. 13CECG03906

Gill v. Fresno Community Regional Med. Ctr. ("Gill")
Court Case No. 14CECG01472

Stevenson v. Fresno Community Regional Med. Ctr. ("Stevenson")
Court Case No. 14CECG02305

Riddle v. Community Medical Centers ("Riddle 1")
Court Case No. 14CECG02360

Maldonado v. Fresno Community Regional Med. Ctr. ("Maldonado")
Court Case No. 15CECG01565

Riddle v. Community Medical Centers ("Riddle 2")
Court Case No. 16CECG00791

Hearing Date: **June 14, 2016 (Dept. 402)**

Motion: Plaintiffs' Motions for an Order that Depositions Taken in the *Arteaga/Perez* Matter Have the Same Force and Effect as if Taken in the Above-Mentioned Cases: *Gill, Stevenson, Riddle 1, Maldonado, and Riddle 2*

Tentative Ruling:

Sanctions Pursuant to Code of Civil Procedure Section 128.7:[1]

To issue an Order to Show Cause and set a hearing on the court's own motion for August 9, 2016, ordering plaintiffs' counsel, namely the law firms of Heimberg, Barr, the Mitchell Law Group, and the Saldo Law Group, and attorneys James West, Steven A. Heimberg, Marsha E. Barr-Fernandez, Jeffrey S. Mitchell, Rebecca Byrne, Steven Saldo and Tyler Saldo, to show cause why they should not be found in violation of section 128.7 in filing the above-listed motions and why they should not be sanctioned in the amount of $999.00, payable jointly and severally, unless on or before July 11, 2016 (the "safe harbor period"), plaintiffs' counsel withdraw said motions. In that event, counsel shall promptly give the court, and all parties, written notice of this. (*Liberty Mut. Fire Ins. Co. v. McKenzie* (2001) 88 Cal.App.4th 681, 691.) Once the court is so notified, this Order to Show Cause will be taken off calendar.

[1] Code of Civil Procedure section 128.7 will be referred to hereafter as "Section 128.7."

If said motions are not withdrawn, plaintiffs' counsel shall appear on August 9, 2016, and show that the above-listed motions are warranted by existing law, are not lacking in legal merit, and do not make frivolous arguments for the establishment of a new law. (Code Civ. Proc., § 128.7, subds. (b) & (c)(2).) In that event, the following briefing schedule will apply: 1) briefs by plaintiffs' counsel shall be filed and served on or before July 12, 2016; 2) any briefs defense counsel wish (but are not required) to file shall be filed and served on or before July 27, 2016; 3) any necessary Reply briefs by plaintiffs' counsel shall be filed and served on or before August 2, 2016.

Sanctions Pursuant to Code of Civil Procedure Section 575.2 and California Rules of Court, Rule 2.30:

In addition, the court sets a hearing on the court's own motion for August 9, 2016, ordering the above-named firms and counsel to show cause why separate sanctions in the amount of $999.00, payable jointly and severally, should not issue as a result of filing the above-listed motions in complete lack of conformity with pertinent Local and State Rules of Court, pursuant to Code of Civil Procedure section 575.2 (for violation of Fresno Local Rules, Rule 2.2.1), and California Rules of Court, Rule 2.30 (for violation of California Rules of Court, Rules 3.110 and 3.112). Pursuant to subdivision (b) of Rule 2.30, these sanctions are "[i]n addition to any other sanctions permitted by law," and thus the hearing on this Order to Show Cause shall take place regardless of whether the motions at issue are withdrawn. The briefing schedule listed above shall also apply to this Order to Show Cause.

The above-listed motions will also be continued to August 9, 2016, to trail the ruling on the sanctions issues.

The clerk shall serve a copy of the minute order adopting and attaching this Tentative Ruling on all parties who have appeared in each of the above-listed cases.

Explanation:

The court notes at the outset that these motions were filed after this court's denial of plaintiffs' procedurally defective motion to consolidate where, in addition to pointing out why the requested relief was not adequately supported by law nor appropriate in these cases, the court noted two separate acts which could have subjected plaintiffs' counsel to sanctions at that time: 1) the forging of attorney James West's signature on, *inter alia,* his purported declaration under penalty of perjury; and 2) citation to, quotation from, and reliance on several unpublished and noncitable cases. The court admonished counsel for this conduct and indicated any future conduct of this nature would subject counsel to sanctions.

In the face of these warnings, plaintiffs' counsel have filed these motions which, from the court's perspective, represent frivolous arguments for the establishment of new law *and* represent the use of law and motion procedures in violation of relevant state and local court rules. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649—definition of "frivolous" includes arguing a point which is "totally and completely devoid

of merit" (interpreting Code Civ. Proc. § 128.5, and quoting *In re Walters' Estate* (1950) 99 Cal.App.2d 552, 558.)

In addition, these motions seek improper renewal/reconsideration of the denied motion for consolidation: the moving briefs effectively admit this, as plaintiffs argue that "the instant motion is *much more focused* than the previous motion, and the [collective] Plaintiffs are attempting to *seek more specific relief* per their understanding of the *Perez* Court's [i.e., this court's] suggestion," and they point out this is why they did not include the *Soto* action, involving St. Agnes, in these motions. (Plaintiffs' Memo. Pts. & Auth., p. 2:5-11, emphasis and brackets added.) Therefore, the conduct is sanctionable under Code of Civil Procedure section 1008, subdivision (d). (*Id.*, allowing for sanctions pursuant to Section 128.7.)

For these reasons, the court believes that a simple warning about future misconduct in these actions will not suffice, and that it must resort to stronger measures to deter such conduct and encourage proper conduct from plaintiffs' counsel in the future. All three plaintiffs' firms and counsel listed on the motions are included because they have all associated collectively on these motions, thus making an implied certification as to their legal merit. (Sect. 128.7, subds. (a) & (b).)

Violations of Local and State Court Rules (Sanctions Pursuant to Code Civ. Proc., § 575.2 and Cal. Rules of Court, Rule 2.30):

These are six *separate*, *unconsolidated* cases. Except for the two Riddle actions (one being a wrongful death action and the other the survivorship action regarding the same decedent), each case involves different plaintiffs, since they raise claims about different surgeries on different patients.[2] Additionally, they do not share the same defendants: while each case involves the Hospital and Chaudhry Defendants, all but one (*Gill*) names other defendants in addition to the Hospital and Chaudhry Defendants.

The following are the issues implicating violations of procedural rules concerning law and motions matters:

- Even though six cases are involved, only five motions were filed, and all were calendared with the clerk, and filed in, *Case #13CECG03906* (*Arteaga/Perez*); none were filed or calendared in the other five actions. Even so, each motion was titled "Plaintiffs' Motion for an Order that Depositions Taken in the *Arteaga/Perez* Matter Have the Same Force and Effect as if Taken in the _____ Matter," with the blank line being filled with the short title of one of the other five cases.

[2] *Riddle 2* was filed after the consolidation motion, so was not considered on that motion. While *Riddle 1* and *Riddle 2* can be consolidated pursuant to Code of Civil Procedure section 377.26, subdivision (b), and this would avoid duplication of effort and conflict in outcomes, the court cannot address this issue, as it is not the presiding judge in either action.

- Each motion had <u>two</u> face sheets, the first with the caption of the *Arteaga/Perez* case, and the second with the caption of one of the five other cases.
- On three of the motions (the ones involving *Riddle 1, Riddle 2, and Gill*) the face sheets include the following statement: "Filed Concurrently in Departments 402 and ___" (with the blank filled in with Department 403 for the motions involving *Riddle 1* and *Gill*, and Department 503 for the one involving *Riddle 2*). Despite this language, as noted above, all motions were <u>only</u> calendared in the *Arteaga/Perez* action, and <u>only</u> in Department 402 (indeed, there is no mechanism whereby the clerk could have calendared *one* motion in *two* departments, even if counsel had requested this).
- Each Notice of Motion stated that "Plaintiffs in the above captioned matters… (***<u>Herein collectively 'Plaintiffs'</u>***) seek an order… (*etc.*)." (Emphasis added.)
- Each Notice of Motion goes on to state, "As captioned above, Plaintiffs are filing this motion in both the *Perez* matter…and the _____ matter…," (with the blank filled in as noted above).

Thus, each motion essentially represents the *Arteaga/Perez* plaintiffs "teaming up" with the plaintiffs in one of the other *separate, unconsolidated* actions, such that one motion was made "collectively" by *Arteaga/Perez* and *Gill*, another was made "collectively" by *Arteaga/Perez* and *Riddle*, another by *Arteaga/Perez* and *Maldonado*, and so on.

California Rules of Court, Rule 3.110, subdivision (b)(1) requires the first page of a motion to specify, below the case number, the "date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable." This does not authorize a moving party to *make its own specification* as to the date, time, location, and name of judge. Instead, this is determined at the time of calendaring pursuant to the pertinent local rule of the court in which the motion is filed, which in this case is Superior Court of Fresno County, Local Rules, Rule 2.2.1. This local rule requires the moving party to reserve motion dates with the clerk, and at that time <u>*the clerk*</u> will designate the time and department of the motion. Neither the state nor the local rules authorize an attorney to call and calendar a law and motion matter in one case and decide that it is "filed concurrently" in two different *Departments* and in two different *cases*, or authorize the attorney to justify this self-created procedure by including the statement in the Notice that "As captioned above [i.e., by use of the *two face sheets*], Plaintiffs are filing this motion in both the ____ matter and the ____ matter."

California Rules of Court, Rule 3.112, subdivision (a) requires all motions to be accompanied by a Notice of Hearing. This does not authorize plaintiffs to include face sheets from two separate cases, or to indicate the motion is "filed concurrently in" different departments. Subdivision (d) of Rule 3.112 requires the motion to "identify the party or parties bringing the motion" and "briefly state the basis for the motion and the relief sought." This does not authorize parties in separate, nonconsolidated actions to "team up" as "collective plaintiffs" and bring a "joint motion" such as plaintiffs did here, no matter how many perceived "overlapping issues" there are between the cases. Plaintiffs' counsel essentially created their own rules for civil law and motion.

This wholesale creation of an unauthorized law and motion procedure not only create logistical confusion for the clerks and court staff, but also created standing issues as to both plaintiffs and defendants. Absent express statutory authorization, only a party to a proceeding may make a motion in that proceeding. (*Difani v. Riverside County Oil Co.* (1927) 201 Cal. 210, 214—"It is settled that one who is not a party to a proceeding may not make a motion therein." See also *Estate of Aveline* (1878) 53 Cal. 259, 261—Sureties not party to action not authorized to make motion to set aside; *U.S. Bank v. City of Kendall* (C.C.D. Kan. 1910) 179 F. 914, 916—"It is a recognized rule of legal procedure that no one not a party to the action, without any disclosed interest in the result thereof, can be permitted to thrust himself into the controversy by filing any character of pleading therein.") The plaintiffs in the *Gill, Stevenson, Riddle 1, Maldonado, and Riddle 2* actions have no standing to make a motion in the *Arteaga/Perez* action.

As for defendants, the "non-Chaudhry/non-Hospital defendants" named in *Gill, Stevenson, Riddle 1, Maldonado, and Riddle 2* each only has standing to file opposition in the cases in which they were named as defendants, and yet *no motions were filed in those cases*. This made it technically impossible for them to oppose the motions which were, at best, only "ghost-filed" in their respective actions. Court staff and clerks had to waste an inordinate amount of time in correcting these erroneous filings, which they only did in order to accommodate these defendants (i.e., to give them standing to oppose the motions). They did this by reversing the two face sheets so that the motions could be considered filed in the *Gill, Stevenson, Riddle 1, Maldonado, and Riddle 2* matters. But since there were only five motions, but six cases, this had the unavoidable effect of leaving *no* motion filed in the *Arteaga/Perez* matter.

Finally, another procedural issue created by these motions is the fact that only three of these cases are assigned to this department: *Arteaga/Perez, Stevenson, and Maldonado*. Two of them (*Gill* and *Riddle 2*) are assigned to Judge Culver Kapetan in Department 403; one of them (*Riddle 1*) is assigned to Judge Simpson in Department 503. As noted above, plaintiffs' self-created solution to this was to include a note that the motions were "filed concurrently" in the proper departments, which is a nullity.

Plaintiffs' act of putting face sheets from two different cases on each Notice of Motion is at least similar to the practice required on a consolidation motion. (Cal. Rules of Court, Rule 3.350—Notice of Motion must contain captions of all cases sought to be consolidated; Code Civ. Proc. § 1048.) To the extent plaintiffs are attempting to "borrow" this procedure, this does not solve the problems noted above. First, such "borrowing" is neither authorized nor proper, as these are not consolidation motions (except to the extent they are regarded as improper and untimely motions for reconsideration of the original motion for consolidation for discovery purposes only). Second, it must be noted that even with consolidation motions the law recognizes the standing issues for potential opposing parties, discussed above, by requiring moving party to file *separate* notices of motion *in each action* proposed to be consolidated, and these are considered *separate* motions; a motion for consolidation is considered a single motion *only for purposes of determining the filing fee*. (Cal. Rules of Court, Rule 3.350, subd. (a)(2)(A).)

Code of Civil Procedure section 575.2 provides that where local rules of court include a provision for sanctioning parties or counsel for failure to comply with those rules, then section 575.2 authorizes a sanctions motions for such violation, which can be filed by any party or the court on its own motion, and monetary sanctions are included in the types of sanctions that may be ordered. Fresno Superior Court's Local Rules includes the predicate provision, at Rule 1.1.6. California Rules of Court, Rule 2.30 also provides for imposition of sanctions for violation of the California Rules of Court, including monetary sanctions, upon a party's motion or on the court's own motion.

The court has set forth in detail above the actions it believes are in violation of both local and state court rules. Sanctions may not be imposed except on noticed motion or the court's own motion, after the court has provided notice and an opportunity to be heard, which has been provided for herein. (Cal. Rules of Court, Rule 2.30, subd. (c); Code Civ. Proc., § 575.2, subd. (a).)

- ***Amount of Sanctions Being Considered for Rule Violations:***

Sanctions under California Rules of Court, Rule 2.30, can be ordered payable to the court, or an aggrieved person (here, opposing defendants), or both, for failure to comply with the applicable rules. (*Id.*, subd. (b).) There is no limit to the amount of monetary sanctions that can be imposed under Rule 2.30 for violation of the California Rules of Court. (*Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 979—contrasting $1,500 limit on sanctions for violation of court order under Code Civ. Proc., § 177.5.) However, the monetary sanction cannot include attorney fees. (*Sino Century Development Limited v. Farley* (2012) 211 Cal.App.4th 688, 697.) In addition to the monetary sanction under subdivision (b) of Rule 2.30, the court can order payment of opposing parties' reasonable expenses, including attorney fees and costs, but only in connection with the sanctions motion or Order to Show Cause and not those incurred as a result of the rule violation itself. (Cal. Rules of Court, Rule 2.30, subd. (d); *Sino Century Development Limited v. Farley, supra* at p. 697-699.) This same rule applies to sanctions under Code of Civil Procedure section 575.2. (*Id.* at p. 697.)

As noted above, the court's only purpose in considering monetary sanctions is to deter what it perceives as violative conduct on the part of plaintiffs' counsel. The court has tentatively set the monetary sanction in the amount of $999.00, payable to the court by plaintiffs' counsel and firms, jointly and severally. Although the court may also order payment of opposing parties' reasonable expenses incurred in connection with the Order to Show Cause, the Court does not foresee the need for defense counsel to brief this issue. Accordingly, the Court will allow defense counsel to file responsive briefs if they deem it advisable, but cautions that expenses will only be ordered reimbursed if the Court finds defense counsel's participation reasonably necessary for a just adjudication of the sanctions issue.

Sanctions pursuant to Section 128.7:

An attorney who presents a motion to the court makes an implied certification as to its legal and factual merit, and is subject to sanctions for violation of this certification. (Sect. 128.7; *Murphy v. Yale Materials Handling Corp.* (1997) 54 Cal.App.4th 619, 622, *as*

modified on denial of reh'g (May 22, 1997).) Included in this implied certification is that the legal contentions asserted in the motion are warranted by existing law or by a nonfrivolous argument for the extension or change in existing law. (Sect. 128.7, subds. (a) & (b).)

Since Section 128.7 does not apply to discovery motions (*Id.*, subd. (g)), the first question is whether these motions are in that category. They *do* involve considerations of how to treat depositions taken in the *Arteaga/Perez* matter, and one of plaintiffs' stated goals is to "streamline discovery." However, the Civil Discovery Act provides no authorization for such a motion (seeking an order that depositions in one action be treated as if they had been taken in other, unconsolidated, actions), nor did plaintiffs cite a single discovery statute in their moving brief. These factors weigh against considering these as "discovery motions."

Furthermore, the wrongful conduct about which this court is concerned has to do with misuse of law and motion practice and the use of meritless arguments on their motions (which falls within the ambit of sanctions under section 128.7), rather than a misuse by plaintiffs of any discovery practice (which is what discovery sanctions are designed to address). Therefore, the court concludes that these motions are not discovery motions and that section 128.7 is applicable.

The only authority plaintiffs cited to support the relief requested was: 1) Code of Civil Procedure Section 128, subdivision (a) (court's power to "amend and control its processes, etc."); 2) California Rules of Court, Rule 3.727 (what the court can consider and "take appropriate action" regarding at any case management conference); and 3) a comment made by the court, *in dicta,* in its Tentative Ruling issued March 30, 2016 (plaintiffs arguing that the relief requested by these motions is within the ambit of the court's comments). None of these provide any support for the relief requested. Thus, these motions have no merit whatsoever.

First, Rule 3.727 of the California Rules of Court regarding what the court may do at a case management conference has little, if any, application here, as this is not a case management setting, nor would it be proper for this court to make case management decisions about cases assigned to other judges. Nor did plaintiffs provide any authority for this sort of unusual order ever being made within the context of general case management.

Second, while Code of Civil Procedure section 128, subdivision (a) allows the court flexibility in controlling its docket, this does not allow the court to adopt a procedure that conflicts with statutes or rules, or which is inconsistent with the Constitution or case law. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967, *as modified on denial of reh'g (Oct. 22, 1997)*.) Section 128 itself indicates that the court's discretionary power must be used in a way that makes its process and orders "*conform to law* and justice. (Code Civ. Proc. § 128, subd. (a)(8), emphasis added.)

There are statutes which clearly set forth the law on how and when depositions from one action can be used in another action (namely, Ev. Code §§ 1290-1292), which

are distinct from – and certainly more stringent than – the law governing how and when depositions taken in the same action can be used (see, *e.g.,* Code Civ. Proc. § 2025.620). Plaintiff has not pointed to any statute authorizing the court to order, against defendants' objection, that depositions falling into one category be treated as if they belonged in another. Plaintiffs are essentially asking that the depositions in question be treated in a manner that does not conform to the law applicable to them. The court's discretion conferred by Code of Civil Procedure section 128 provides no support for plaintiffs' request. Nor is consideration of the implications as to admissibility of evidence premature, as plaintiffs argue, since granting plaintiffs' request would impact not only how the depositions would be used at trial, but also how they could be used on motions (such as summary judgment motions).

Third, the court's comments in the earlier Tentative Ruling provide absolutely no support for these motions. In the court's opinion, this is the most egregious misuse of "authority" to support these motions. The court did commend plaintiffs' stated desire to "streamline discovery to the extent possible," even though the solution proposed on the consolidation motion was not the right one. The court further stated: "The parties are free, and are encouraged, to ***stipulate*** to measures which would prevent duplicative depositions where possible…. And to the extent the court can ***assist*** this process, it is available for ***conference*** upon proper notice."

Plaintiffs' counsel grievously mistakes this court's offer of assistance. This is best illustrated by their own description of meet and confer efforts with defense counsel. This consisted of asking the other parties to stipulate to the relief requested, with the threat that if they did not plaintiffs would file these motions. The opposition briefs reveal that this meet and confer effort was half-hearted, at best. Little time to consider the request was given (notice was given on April 4 and the motion was filed April 13), and little information was provided for the "non-Hospital, non-Chaudhry" defendants, despite their request for this, before plaintiffs resorted to filing these motions. In Reply, plaintiffs' counsel argue these efforts were in good faith, but it was "clear that *court intervention* would be necessary." (See, *e.g.,* Reply Brief to Chaudhry defendants' opposition, p. 4:2, emphasis added.)[3]

Of course, there is no statutory provision for *court intervention* for the relief sought by these motions. Nor did the court's comments about encouraging *stipulations* and being available for *conference* to *assist* the parties remotely suggest this court was providing plaintiffs with an open door to *force* defendants to do anything. The language certainly did not suggest the court anticipated this would authorize or result in a noticed motion. It should go without saying that a "forced stipulation" is an oxymoron. (And, on reflection, the fact that three of these cases are assigned to other departments makes the offer of assistance inadvisable in the first place; in the event it is not already quite clear, the court hereby recants that offer.)

In this court's opinion, plaintiffs are making frivolous arguments for establishment of a new law as to the treatment of depositions taken in the *Arteaga/Perez* matter. In addition, these motions essentially represent untimely and defective motions for

[3] Each of plaintiffs' five Reply Briefs included the same sentence.

reconsideration of the court's ruling on the earlier motion for consolidation for discovery purposes. This merits sanctions pursuant to section 128.7, unless the motions are withdrawn on or before July 11, 2016.

- ***Amount of Sanctions Pursuant to Section 128.7***

A monetary sanction imposed for violation of Section 128.7 after a court-initiated order to show cause is limited to a penalty payable to the court and may not include or consist of sanctions payable to a party. (Section 128.7, subd. (d); *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 443-444; *Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc.* (2013) 217 Cal.App.4th 708, 710.) The court tentatively intends to set the sanctions amount at $999.00, as an amount calculated to deter repetition of this conduct. (*Id.,* subd. (d); *Trans-Action Commercial Investors, Ltd. v. Jelinek* (1997) 60 Cal.App.4th 352, 368.) In the event appropriate correction is made during the safe harbor period, no sanctions will be ordered. (Section 128.7, subd. (c)(1); *Malovec v. Hamrell, supra,* at p. 442.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 6/13/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Su v. ECO Integrated Development, Inc., et al.***
Court Case No. 14 CECG 02826

Hearing Date: June 14, 2016 (Dept. 402)

Motion: Motion for Reconsideration [Of Order Denying Request for Default Judgment]

Tentative Ruling:

To deny plaintiff's motion. To grant Court's own motion and enter a new and different order denying the request for default filed February 11, 2016. The order denying the default prove up is entered without prejudice.

Explanation:

Statutory Motion for Reconsideration:

Code of Civil Procedure section 1008 provides that "[w]hen an application for an order has been made to a judge, or to a court, and … denied ... any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." "The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (*Ibid*.)

A party's right to seek reconsideration of an interim order or renewal of a previously denied motion is governed by section 1008, which provides in relevant part as follows: "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. *No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section*." (§ 1008, subd. (e), italics added.)

The California Supreme Court held the procedural requirements of section 1008 are jurisdictional in *Le Francois v. Goel* (2005) 35 Cal.4th 1094. (*Id*. at p. 1103-1104.) By contrast, because trial courts have the inherent power to reconsider and correct their own interim decisions in order to achieve substantial justice, section 1008 does not limit a court's ability to reconsider its interim orders on its own motion. (*Id.* at p. 1107.)

A request to enter a default judgment is subject to section 1008. "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." (Code Civ. Proc., § 1003.) Accordingly, the order denying the request for default judgment is subject to reconsideration only under the auspices of section 1008.

Plaintiff's motion does not meet the requirements of section 1008. Although the motion is timely, having been filed within a day of the service of the challenged order, the motion offers no new facts, law or circumstances that did not exist at the time of the original application. Instead it argues the court made a mistake of law in misreading the plaintiff's papers which clearly requested backpay, not front pay.

A party seeking reconsideration must also provide a satisfactory explanation for the failure to produce the evidence or information at an earlier time. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 689; *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212; *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198-1201.) This motion only argues the court misinterpreted the papers before it. This is insufficient to invoke reconsideration under section 1008.

Reconsideration on the Court's Own Motion:

That said, the Court concludes the Court's prior ruling citing failure to prove up an entitlement to front pay was in error as a matter of law and should be corrected.

Front pay is an award of the salary and benefits a wrongfully discharged plaintiff would have earned from the employment *after the trial*. (*Mize-Kurzman v. Marin Community College Dist*. (2012) 202 Cal.App.4th 832, 873, fn. 17.) "[B]ack pay refers to the amount that plaintiff would have earned but for the employer's unlawful conduct, minus the amount that plaintiff did earn or could have earned if he or she had mitigated the loss by seeking or securing other comparable employment" *up to the time of the judgment*. (*Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1144; Gov. Code §§ 12965, 12970.)

Here, the papers submitted in support of the default prove up were clear that they sought damages for the one year post termination prior to the entry of judgment in this action. As such they would be backpay, not front pay.

However, the evidence offered in support of the default prove up failed to justify an award of backpay. First, there is no admissible evidence of plaintiff's base salary. Plaintiff's "declaration" is not signed under penalty of perjury. (See Code Civ. Proc. § 2015.5.) Even if it were, it only supports an annual salary of $150,000, not $185,000. Second there is no admissible evidence that plaintiff did not work during the year following her termination by defendants. An absence of evidence in plaintiff's file does not give rise to an inference that plaintiff had no other employment without far more of a factual showing. Third, Moore made no attempt to establish the basis for his alleged personal knowledge for his testimony. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, 753 [conclusory allegation of personal knowledge not sufficient where the facts stated in the declaration are not matters as to which the declarant would presumably have

personal knowledge].) It appears he based his testimony off material in the Labor Commission's files but he failed to establish an exception to the hearsay rule for the contents of the documents. (See Evid. Code §§ 1270-1272.) Significantly more evidence is required to prove up an entitlement to any given amount of backpay.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 6/13/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(2)

Tentative Ruling

Re: ***In re Lianna Lusse***
Superior Court Case No. 16CECG00831

Hearing Date: June 14, 2016 (**Dept. 403**)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 06/08/16 .
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: ***Bank of Stockton v. Garcia***
Case No. 12 CE CG 03902 (Lead Case)

Consolidated with ***Maddox v. Bank of Stockton***, Case No. 13 CE CG 00135 and ***Garcia v. Garcia***, Case No. 15 CE CG 01410

Hearing Date: **June 14, 2016 (Dept. 403)**

Motion: Defendant Bank of Stockton's demurrer to the Third Amended Complaint of Morris Garcia and Sharon Garcia filed in case number 15CECG01410

Tentative Ruling:

To sustain the demurrer without leave to amend. (CCP §§ 430.10(e).) Defendant Bank of Stockton shall submit to this court, within 7 days of service of the minute order, a request dismissing the action filed under case number 15CECG01410 as to the demurring defendant.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE ENTERTAINED AT 2:00 PM ON TUESDAY, JUNE 14, 2016.

Explanation:

Where the complaint fails to plead ultimate facts, the complaint is subject to a demurrer. (Code of Civil Procedure § 430.10(e); *Berger v. California Ins. Guar. Ass'n* (2005) 128 Cal.App.4th 989, 1006.) Generally, "[i]n determining the merits of a demurrer, all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) Additionally, "the complaint must be construed liberally by drawing reasonable inferences from the facts pleaded." (*Ibid*.) Essentially, the complaint is given, "a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) In sum, "[t]he allegations of the complaint must be regarded as true." (*Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, 105.) "It must be assumed that plaintiff can prove all of the facts as alleged." (*Ibid*.)

Causes of Action for Money Had and Received, Unjust Enrichment/Restitution and Imposition of a Constructive Trust

"A cause of action for money had and received is stated if it is alleged the defendant 'is indebted to the plaintiff in a certain sum 'for money had and received by the defendant for the use of the plaintiff.' ' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460, quoting *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623.) A successful claim requires the plaintiff to, "prove that the defendant received money

'intended to be used for the benefit of [the plaintiff],' that the money was not used for the plaintiff's benefit, and that the defendant has not given the money to the plaintiff." (*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454, quoting CACI No. 370.)

Similarly, where the retention of property (or its equivalent) is unjust, the property must be returned to the aggrieved party. (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 460.) The imposition of a constructive trust is authorized to prevent unjust enrichment. (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 399.)

In the present case, assuming the truth of the allegation that the Bank received Morris and Sharon's capital accounts, whether Morris and Sharon have sufficiently stated causes of action for Money Had and Received and Unjust Enrichment/Restitution is determined by whether Morris and Sharon should have received those funds pursuant to their retention of their "membership interests".

Membership vs Economic Interests

The Bank of Stockton ("Bank") received Morris Garcia ("Morris") and Sharon Garcia's ("Sharon") economic interest in the VDS LLCs. (Third Amended Complaint ["TAC"], ¶ 52.) While the Bank received the economic interest, Morris and Sharon also allege they retained a "membership interest" in the company. However, there is nothing in the operating agreements that states that a person holding only a membership interest, who has been divested of their economic interest, continues to be entitled to their original capital contribution.

Morris and Sharon argue the operating agreements allow two categories of Capital Accounts: one for Members and one for Interest Holders. (see P&As in opposition, pg. 8:4-8.) The provision of the operating agreements cited for support for this proposition states, "[a] separate Capital Account shall be maintained for each Member and Interest Holder . . .." (Id. citing Operating Agreement § 3.4.) However, Article 3 (of which § 3.4 is a part) addresses the capital contributions required for each member upon the "formation of the Company". (see § 3.1.) At the time of formation, each member held an economic interest which in turn designated the member as an interest holder. Accordingly, the only reasonable interpretation of § 3.4 is that upon formation of the company, each member (who at the time of formation was also an interest holder by way of their economic interest) had a capital account separate from the other members. There is nothing in Article 3 that states that a member, who subsequently was divested of their designation as an interest holder, remained entitled to the capital account they contributed to at the time of formation.

Moreover, pursuant to the Operating Agreements, only interest holders were entitled to receive a distribution from the Capital Accounts upon liquidation. (TAC,x. B, § 6.8.) This provision is consistent with § 1.8 which states that Capital Accounts are only maintained for persons who are interest holders. § 1.17 specifies that interest holders are persons holding an economic interest. Thus, a person holding only a membership interest would not be entitled to a distribution from a capital account. Consequently, Morris and Sharon, who only hold membership interests, would not be entitled to the funds held in the capital accounts. In contrast, the Bank, as the holder of Morris and

Sharon's economic interest was accordingly an interest holder who could receive a distribution from the capital accounts.

In sum, Morris and Sharon acknowledge they do not have an economic interest in the LLCs. (TAC, ¶ 52.) Under the operating agreements, the capital accounts are only maintained for those persons holding economic interests. Without holding an economic interest, Morris and Sharon were not entitled to the capital accounts. Accordingly, Morris and Sharon have not adequately pled the Bank's receiving the proceeds from the capital accounts is unjust. Moreover, to the extent Morris and Sharon allege the Bank wrongfully received the funds to be reserved for tax purposes, there is no allegation the Bank was a party to that agreement nor possessed the ability to vote to discontinue that agreement, i.e. it is not alleged the Bank had a voting interest in the LLCs. Similarly, there is no allegation the Bank possessed a sufficient interest in the LLCs to vote on compensation for services rendered.

Consequently, as to the Bank, the TAC does not adequately state causes of action for Money Had and Received, Unjust Enrichment/Restitution or Imposition of Constructive Trust. The demurrer is sustained. The operating agreements unambiguously state that capital accounts are only maintained for interest holders and that persons with economic interests are interest holders. The Bank had such an economic interest. It does not appear that future amendment would be able to construe the operating agreement any different. Accordingly, leave to amend is not granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 06/13/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Forestiere v. Forestiere et al.***
Court Case No. 14 CECG 02771

Hearing Date: June 14, 2016 (Dept. 403)

Motion: Defendants' Motion for Summary Judgment

Tentative Ruling:

To grant as to Nicolas P. Forestiere, Marc Forestiere, Lyn Kosewski, Valery Forestiere, Juliet Gilkey, & Forestiere Undergrounds Gardens, LLC. To deny as to Rosario Ricardo Forestiere.

Prevailing parties shall submit a form of judgment consistent herewith to this department within five days of the clerk's service of this minute order.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE ENTERTAINED AT 2:00 PM ON TUESDAY, JUNE 14, 2016.

Explanation:

Plaintiff Andre Forestiere ("Andre")[4] is the son of Lorraine Forestiere ("Lorraine"), the decedent, and Rosario Ricardo Forestiere ("Ric"). (Defendants' Undisputed Material Fact ("UMF") No. 1.) Andre's siblings, Lorraine and Ric's other children, are defendants Nicolas P. Forestiere ("Nicholas"), Marc Forestiere ("Marc"), Lyn Kosewski ("Lyn"), Valery Forestiere ("Valery"), and Juliet Gilkey ("Juliet"). (*Ibid*.) The Forestiere Underground Gardens, LLC ("FUG, LLC") is also a defendant and is owned by Lyn and Valery. (UMF No. 30.) All defendants move for summary judgment on the single remaining claim in the operative First Amended Complaint: intentional interference with expected inheritance ("IIEI").

No Continuance is Warranted:

Code of Civil Procedure section 437c, subdivision (h) provides, in relevant part:

> If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.

(Code Civ. Proc., § 473c., subd. (h).)

[4] The parties are referred to by their first names, not out of disrespect, but because many share the same last name.

A party seeking to continue a hearing on a summary judgment motion " 'must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' [Citation.]" (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.) " 'The purpose of the affidavit required by Code of Civil Procedure section 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion. [Citations.]' " (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397.)

Here, plaintiff's Declaration in Support of a Continuance indicates that, after he was served with the instant motion, he served his own Request for Production of Documents on April 28, 2016. The Request seeks: documents evidencing the value of the Gardens from 2003 through Lorraine's date of death; documents evidencing the value of the House from 2003 through Lorraine's date of death; any estate planning documents prepared by Bradley S. Towne from 1992 to Lorraine's date of death; documents supporting the allegation that Lorraine took approximately $79,789 from Ric and Lorraine's joint accounts during the period from September 1999 to May 2003; documents supporting defendants' contention that Lorraine had given and was giving tens of thousands of dollars to Andre; documents which support defendants' contention that Lorraine had received monthly pension checks from Ric during the period from August 2003 to the time of Lorraine's death; documents supporting defendants' contention that Andre physically attacked Ric on October 31, 2007; and documents which support defendant's contention that Lorraine wanted to have sole ownership of the house for her peace of mind.

The date of production of these documents was to be May 27, 2016. The place of production was to be a copy center. When defendants responded, they made extensive objections and changed the location of production to defense counsel's office "on a mutually agreeable date and time." Because plaintiff's opposition was due May 31, 2016, and defense counsel had failed to respond to his request to meet and confer over the matter as of 9:00 a.m. on May 31, 2016, plaintiff requests a continuance to obtain these documents.

Plaintiff's only attempt to meet the three requirements of *Frazee v. Seely*, *supra*, 95 Cal.App.4th at p. 633, is the statement, "The inadequate and delayed response deprives me a timely a reasonable opportunity to challenge the material facts alleged by the defendants."

This is inadequate. It does not establish that any responsive document exist. (Nor does the response by defendants which merely states, that "to the extent they exist and are in Responding Part's possession" they will be made available for inspection.) Moreover, plaintiff does not identify what *facts* he intends to establish by virtue of these documents, much less explain how these facts will defeat the motion for summary judgment.

A continuance is not mandatory where the declaration in support thereof fails to meet the requirements set forth in *Frazee v. Seely*, *supra*, 95 Cal.App.4th at p. 633.

Nonetheless, the court must exercise its discretion to determine whether the party requesting the continuance has established good cause therefor. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254; *Chavez v. 24 Hour Fitness USA, Inc*. (2015) 238 Cal.App.4th 632, 643 [though continuance discretionary, it is virtually mandated "upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion"].)

Here, the desired documents are not necessary for the resolution of the motion. The documents supporting valuation of the Gardens and House are not relevant because plaintiff alleges that the Gardens were worth more than the Home in his complaint, and defendants have not controverted this allegation in their moving papers. (See First Amended Complaint ¶ 26.) As set forth in more detail below, defendant Ric's failure to challenge all the theories alleged in the First Amended Complaint is fatal to his motion for summary judgment.

The estate planning documents are not necessary as there is no dispute about the content of the documents. Both sides agree that they would have created a trust containing the Gardens in favor of Ric, and Lorraine's children. (Nicholas decl. ¶ ¶ 7, 9; Andre Decl. ¶ 11.) And both side agree that they were never signed. (Nicholas Decl. ¶¶ 7, 9; First Amended Complaint ¶¶ 46-51.) Thus, the actual documents would do nothing to further plaintiff's case.

The documents concerning Lorraine's alleged misappropriation of money in 1999 through 2003 have nothing to do with whether she was subject to undue influence or elder abuse in 2008 through 2012 such that she was prevented from retaining the gardens or making a will that left property to Andre. They are immaterial and irrelevant to this motion.

Documents supporting the contention that Lorraine received all her pension payments do nothing to support Andre's contention that the pension payments were withheld or threatened to be withheld, and are thus immaterial to this motion.

Finally, documents concerning Andre's alleged attack on his father have nothing to do with any intentional interference with Andre's expected inheritance, Lorraine's state of mind, or any fraud, undue influence or elder abuse of Lorraine. They are irrelevant to this motion.

Accordingly, the requested continuance is denied.

Burden on Summary Judgment

In ruling on a motion for summary judgment or summary adjudication, the court must "consider all of the evidence' and all of the 'inferences' reasonably drawn there from and must view such evidence and such inferences 'in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the

movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005) 126 Cal.App.4th 1052, 1057-1058.)

As the moving party, defendants "bear[] an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.) If defendants meet this burden, then the burden of production shifts to plaintiff "to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid*.)

A defendant who seeks a summary judgment must define *all* of the theories of liability alleged in the complaint and challenge *each* factually; if the defendant fails to do so, he or she does not carry the initial burden of showing the nonexistence of a triable issue of material fact. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165; *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714.)

Intentional Interference with Expected Inheritance:

To plead a cause of action for the intentional interference with expected inheritance, a plaintiff must allege five distinct elements:

> First, the plaintiff must plead he had an expectancy of an inheritance .... Second, ... the complaint must allege causation. This means that ... there must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator ... if there had been no such interference.... Third, the plaintiff must plead intent, i.e., that the defendant had knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it.... Fourth, the complaint must allege that the interference was conducted by independently tortious means, i.e., the underlying conduct must be wrong for some reason other than the fact of the interference.... Finally, the plaintiff must plead he was damaged by the defendant's interference.

(*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1057 (fourth ellipses in original) [citations and quotation marks omitted].)

Additionally, the defendant's alleged independent tortious conduct must have been directed at the testator. (See *Id*. at pp. 1057–1058.) "In other words, the defendant's tortious conduct must have induced or caused the testator to take some action that deprives the plaintiff of his expected inheritance." (*Id*. at p. 1058 [citations omitted].) Finally, the tort is available only when the aggrieved party lacks a remedy via the probate system. (*Id*. at p. 1053.)

Defendants challenge each element.

Expectancy of an Inheritance:

Defendants assert that Andre has no expectation of inheritance from Lorraine, let alone one that was "reasonably certain" to be in effect at the time of her death. This is disputed. While defendants establish that Lorraine executed a will in 1965 leaving her estate to her husband Ric, if she predeceased him, and nothing to her children if Ric did not predecease her (UMF Nos. 11-14), and that Lorraine had many opportunities to execute wills and trusts leaving her property to her children (UMF Nos. 20, 26.), Andre has come forth with admissible evidence that Lorraine's intent was to leave her property, in particular her share of the Gardens, to her children.

Andre's declaration establishes that in 2000 Lorraine developed her own partly holographic will that included a plan to create a trust containing her interest in the Gardens. (Andre Decl. ¶ 10.) Although this will was destroyed when the 2003 Bradley Towne estate planning documents were received, it is some evidence of testamentary intent to leave bequests to her children. And although Lorraine never executed the Towne estate plans that would have created a trust containing Lorraine's interest in the Gardens in 2003 through 2007, which might be evidence a lack of testamentary intent to her children, Andre has presented evidence that on the day before she signed the interspousal deed that terminated her interest in the Gardens in return for a 100% interest in the Home, Lorraine expressed her reluctance to go through with the deal. (Andre Decl. ¶ 17.) Lorraine told Andre that she wanted her son Nicholas to complete a trust for the benefit of all the children, including Andre. (*Ibid*.) Lorraine signed a letter that Andre typed to this effect and Andre faxed it to Nicholas the day of the interspousal transfer. (*Ibid*.) She expressed reluctance again at the time of the signing. (*Ibid*.) But, according to Andre, signed the deed because she wanted to have the ability to throw her husband out of the house. (*Ibid*.)

This is directly contrary to Nicholas's Declaration wherein he states that Lorraine did not recall seeing the faxed letter to Nicholas, only that Andre had pressured her to sign it. (Nicholas Decl. ¶13.) This is also contrary to Marc's declaration wherein he states that at the time the interspousal deed was signed, Lorraine was told she not have to sign the deed, she could consult an attorney, Lorraine declined an attorney, and was happy to sign the deed. (Marc Decl. ¶ 7.) A trial court, in ruling on a motion for summary judgment, may not weigh the evidence or make credibility determinations. (*Binder v. Aetna Life Ins. Co*. (1999) 75 Cal.App.4th 832, 840.)

This factual dispute regarding Lorraine's testamentary intent, coupled with the factual dispute regarding undue influence and elder abuse renders it impossible for the court to determine that Andre could not establish the first element of his cause of action for IIEI.

Knowledge of the Claimed Expectation of Inheritance

Defendants have presented evidence that Marc, Lyn, Valery and Juliet had no direct knowledge that Lorraine ever intended to make any bequest of her property to Andre. (Marc, ¶ 11; Lyn Decl. ¶ 11; Valery ¶ 5; Juliet ¶ 5.) There is no evidence that they were ever aware of the 2000 holographic will. (UMF No. 18.) It was apparently never shown to anyone but Andre. (Andre Decl. ¶ 10.) Likewise there is no evidence anyone

but Ric and Nicholas ever knew about the Towne estate planning documents. (Nicholas Decl. ¶¶6, 9.)

In opposition, Andre declares that in 2006, the children met in the absence of Ric and Lorraine to discuss that there should be a trust and will for their parents' assets and that Nicolas should be the trustee. (Andre Decl. ¶ 13.) However, since Lorraine was not at this meeting, it is not evidence of *Lorraine's testamentary intent*, and not evidence that Andre's siblings knew of Lorraine's testamentary intent.

Accordingly, Andre has no evidence that Marc, Lyn, Valery, and Juliet ever knew of Andre's claimed expectation of inheritance from Lorraine and summary judgment is proper as to them.

Tortious Intentional Interference with Expected Inheritance

Andre appears to raise two theories as to how defendants tortuously interfered with his inheritance: they unduly influenced Lorraine and committed financial elder abuse.

Undue Influence

Undue influence constitutes pressure brought to bear directly sufficient to overcome the testator's free will, amounting, in effect, to coercion destroying the testator's free agency. (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684.) "The presumption of undue influence arises only if *all* of the following elements are shown: (1) the existence of a confidential relationship between the testator and the person alleged to have exerted undue influence; (2) active participation by such person in the actual preparation or execution of the [document], such conduct not being of a merely incidental nature; and (3) undue profit accruing to that person by virtue of the [document]. If this presumption is activated, it shifts to the proponent of the [document] the burden of producing proof by a preponderance of evidence that the [document] was not procured by undue influence. It is for the trier of fact to determine whether the presumption will apply and whether the burden of rebutting it has been satisfied. [Citations.]" (*Estate of Sarabia* (1990) 221 Cal.App.3d at 599, 605, original italics.)

A confidential relationship exists between husband and wife living together. Ric and Lorraine lived under the same roof for approximately six months out of the year even after Lorraine obtained exclusive title to the House. (UMF No. 6; Andre Decl. ¶ 9.) There is a triable issue of material fact as to Ric's participation in the procurement of the interspousal deed from Lorraine. Although Ric declares he did not threaten to withhold any money from Lorraine if she did not sign the interspousal deed, or if she tried to see an attorney about it, the First Amended Complaint alleges that "approximately a week before the execution of the interspousal agreement Rosario subjected Lorraine to verbal abuse and threats causing her fear, severe mental and emotional stress, and loss of sleep, Rosario threatened to have Lorraine thrown out of her home." Ric does not contradict these allegations of abuse. A defendant moving for summary judgment must "define all of the theories alleged in the complaint and challenge each factually." (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714; see also *Hawkins v. Wilton*

(2006) 144 Cal.App.4th 936, 943, 949 [granting defendant's motion for summary judgment was error where defendant failed to address or negate plaintiff's liability theories].)

Andre introduces evidence that Lorraine told him that Ric had threatened and harassed her with verbal abuse for several days prior to the signing of the interspousal deeds and by going into her room and interrupting her sleep. (Andre Decl. ¶ 17.) Ric wanted Lorraine to sign away her interest in the Gardens. (*Ibid*.)

Finally, the First Amended Complaint alleges that the value of the Gardens was "several hundred thousand dollars" greater than the value of the house" – a contention defendants do not rebut in their motion

Accordingly, there is a triable issue of material fact as to whether Ric actively participated in the procurement of the interspousal deeds by means of undue influence and whether he unduly profited by the deeds.

There is no issue as to whether Nicholas committed undue influence, as he had no confidential relationship with Lorraine merely as her son and perhaps as her former attorney. The mere relationship of parent and child does not give rise to a confidential relationship. (*Best v. Paul* (1929) 101 Cal. App. 497, 499.) Nicholas lived apart from Lorraine in Roseville, California; he saw her two to three times a year and, she did not depend on him for his income or for daily assistance. (Nicholas ¶¶ 3-4.) Also, he did nothing to procure the interspousal deeds except suggest which form they should take and proofread them. (Nicholas Decl. ¶ 10.) Finally, he did not profit from the transfer.

Financial Elder Abuse

Andre's cause of action for IIEI incorporates his first cause of action for financial elder abuse. Although this court sustained defendants' demurrer to this cause of action on the grounds it was time barred, it still represents the allegations of independently wrongful tortious action for the purposes of the IIEI claim.

The elements of a cause of action for financial elder abuse are statutory. Welfare and Institutions Code section 15610.30, subdivision (a) provides: " 'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code."

Absent an allegation of intent to defraud or undue influence, a plaintiff must allege at least a " 'wrongful use' " of property. (Welf. & Inst. Code, § 15610.30, subd. (a)(1); *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 527–528.)

"Wrongful use" is defined in the statute as follows: "A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (b).)

Here there is a triable issue of material fact as to whether Andre can establish a claim of elder abuse against Ric under Welfare & Institutions Code section 15610.30, subdivision (a)(1), obtaining real property for a wrongful use, i.e., obtaining the interspousal deed with the knowledge the conduct was likely to be harmful to Lorraine. Again, Ric fails to rebut the allegation of the First Amended Complaint the Gardens were worth far more than the home. (First Amended Complaint ¶¶ 26-27.) Moreover, he fails to rebut the allegation that due to the loss of the interest in the Gardens, Lorraine would be deprived of any share of the rents, royalties, and income from the Gardens. (First Amended Complaint ¶ 28.) While Lorraine may have achieve some peace of mind from the acquisition of the Home, as sole owner she would be required to pay 100% of the maintenance of the home. It is not clear how she would do with only $25,000 in annual income. (Ric Decl. ¶ 9.) Accordingly, Lorraine appears to have traded a more valuable property with an income stream for a less valuable property with an income cost. This raises a triable issue as to whether Ric "knew or should have known" this was likely to be harmful to Lorraine.

Ric's argument that Andre has admitted his family members are decent people is irrelevant. Decent people may still commit elder abuse. Nor is the fact the transfers were done in the open dispositive. Lorraine's capacity and opportunity to complain are also irrelevant as the elder abuse tort looks to the tortfeasor's state of mind, not the elder victim's state of mind and failure to act.

Finally, Ric's citation of cases prior to the enactment of the Elder Abuse Act, as to the presumption of consideration regarding the interspousal deeds is unavailing. Evidence Code 662 does not prevent evidence of undue influence and elder abuse. The deeds themselves do not cancel out the evidence tending to show the existence of a triable issue of material act as to the presence of elder abuse and undue influence. Nor are the deeds conclusive evidence of *sufficient* consideration, which the Elder Abuse statute requires.

Because there is no evidence that Nicholas, Lyn, Valery, and/or Juliet committed elder abuse or undue influence, including by assisting Ric in obtaining the interspousal deeds, they are alternatively granted summary judgment due to the failure of this element.

Causation

Defendants contend that Andre cannot prove defendants conduct caused the loss of his claimed inheritance because causation because Lorraine remained free to change her estate plan at any time. However, the California jury instruction implementing *Beckwith v. Dahl*, *supra*, 205 Cal.App.4th 1039, CACI 2205, states

causation in the familiar "substantial factor" test. Because the First Amended Complaint identifies a loss of a testate share of the Gardens as a harm suffered (First Amended Complaint ¶ 47) and once Lorraine signed the interspousal deed, she could not form an estate plan regarding the Gardens, there is a triable issue of material fact as to whether Ric's actions were a substantial factor in causing Andre's harm. (See CACI 2205(7); and discussion re: tortuous intentional interference.)

Remedy in Probate Court

Defendants claim that plaintiff has an adequate remedy in probate court but fail to define or describe that remedy. They cite to Probate Code section 8270, allowing for petitions to revoke the probate of a will. However, no petition under section 8270, subdivision (a) would have availed plaintiff. He alleges no fraud, undue influence or elder abuse in the creation of the admitted will, or in the destruction of any subsequent will and/or trust, rather he claims that undue influence and elder abuse caused Lorraine to be unable to make a will and/or trust, and that undue influence and elder abuse deprived Lorraine of the property that would be subject to a will and/or trust, some 43 years after the making of the will. I am unaware of any probate proceeding that would address these claims. Plaintiff had no adequate remedy in probate court.

Evidentiary Objections – Andre's Declaration in Opposition to Motion

The following objections are sustained: Nos. 1, 3, 6, 7, 8, 11, 26, and 29.

The following objections are not applicable due to the sustaining of objections to the entire paragraph: 2, 4, and 27.

The remaining objections are overruled.

The objections to Andre's Declaration in Support of Continuance will not be ruled on as immaterial as the continuance will be denied.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 06/13/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(19)

Tentative Ruling

Re: ***Cordell v. Fresno Heritage***
Court Case No. 14CECG03523

Hearing Date: June 14, 2016 (Department 501)

Motion: by defendant Horswill for summary judgment, or in the alternative, summary adjudication.

Tentative Ruling:

To deny in total.

Explanation:

1. False Imprisonment (1st and 5th C/A)

a. Introduction

The 1st Cause of Action for physical elder abuse is based on false imprisonment, and names Horswill as a defendant. The 5th Cause of Action also names Horswill, and is straight up cause of action for false imprisonment.

"The elements of a tortious claim of false imprisonment are: (1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time, however brief." *Shoyoye v. County of Los Angeles* (2012) 203 Cal. App. 4th 947. See also Penal Code section 236: "False imprisonment is the unlawful violation of the personal liberty of another." Note that there is no requirement that the defendant be the initiator of the confinement.

b. Nonconsensual Confinement for an Appreciable Time

It is not necessary that Horswill have physically confined Cordell himself. Advice to others to do so is enough. In *People v. Agnew* (1940) 16 Cal. 2d 655, the Supreme Court found that speech was sufficient to make one criminally liable for false imprisonment, without any touching. In that case, the defendant caused the detention of another by announcing a citizen's arrest for perjury, said perjury being in a civil case the defendant just lost.

"We deem it immaterial that defendant did not lay hands on Mr. Prouty or that he did not expressly direct the action of the officers in detaining Mr. Prouty and causing him to be booked at the policy station. Such detention was the natural consequence of defendant's announced arrest of Mr. Prouty and was clearly at his implied request and direction." (*Id.* at 659.) "If an act is done with the intention of causing the confinement of the person actually confined or of another and such act is a substantial factor in bringing about a confinement, it is immaterial whether the act directly or indirectly causes the confinement." (*Id*. at 660.)

Cordell made her non-consent clear to Horswill by at least February 5, 2013, when she asked him to help her obtain her release. Horswill decided he would not do so because it felt it was in her best interests to remain confined. He took the position that the Power of Attorney ("POA") for healthcare permitted this, and so advised the facility holding her. He rendered substantial assistance in the intentional confinement of Cordell. The time was appreciable, running for many months.

b. Without Lawful Privilege

The real question therefore becomes whether Horswill was without lawful privilege to do so.

i. POA Excuse

Probate Code section 4689 states:

> "Nothing in this division authorizes an agent under a power of attorney for health care to make a health care decision if the principal objects to the decision. If the principal objects to the health care decision of the agent under a power of attorney, the matter shall be governed by the law that would apply if there were no power of attorney for health care."

That provision was previously numbered 4724 (added in 1994 via S.B. 1907), and then 2440 before that (added in 1983). S.B. 1907 listed the language of Probate Code section 4724 as:

> "Nothing in this chapter authorizes an attorney-in-fact to consent to health care, or to consent to the withholding or withdrawal of health care necessary to keep the principal alive, if the principal objects to the health care or to the withholding or withdrawal of the health care. In such a case, the case is governed by the law that would apply if there were no durable power of attorney for health care."

Since at least 1994, the law has clearly provided that a power of attorney for healthcare is invalid for any decision to which the patient objects. Cordell told Horswill on February 5, 2013 she objected to the decision to place her in a locked facility. The power of attorney was invalid at that point under the law. Further, the POA itself states that it can be used only for care consented to by Cordell. The POA provided no lawful privilege to anyone to perpetuate Cordell's confinement as of the date of her objection.

ii. Bar Association Opinion Excuse

Horswill cites a local bar association opinion permitting an attorney to try to protect a client who has become incapacitated. That opinion cites a 1926 case, *Sullivan v. Dunne* (1926) 198 Cal. 183, 193, which states "It is the statutory rule in this state that the power of an agent is terminated as to any person having notice thereof by the incapacity of the principal to contract. It is also well recognized by the

authorities that the law of principal and agent is generally applicable to the relation of attorney and client, and that the insanity or incapacity of the client will therefore operate as a termination of the authority of the attorney." (Internal citations omitted.) In agreement, see Vapnek et al., Professional Responsibility Guide (TRG 2016) section 10:192. 1 Witkin, California Procedure (4th Ed.), "Attorneys," section 94 on page 131, also states: The incapacity of a client terminates the attorney/client relationship."

That bar association opinion says nothing about representing those who are confining a client and charging a client for it. Instead, it states that "[t]hus, the attorney who believes that the client is impaired is not acting adverse to the client by suggesting to a court that an investigation for a possible conservatorship be established." It further notes that there are now court investigators, who interview proposed conservatees and report to the Court prior to the establishment of any conservatorship. Further, "Such persons are in a position to act as a check against the unscrupulous or misguided attorney . . ."

That opinion also notes that it is not intended to address conflict of interest issues. And it states unequivocally that counsel's "actions should be the least intrusive to the client, given the factual situation at hand." Horswill did not consult a public guardian or suggest an investigation for a possible conservatorship. He instead advised those confining Cordell that such proceedings should be avoided due to expense and difficulty. There is a significant difference between taking an action to protect a client and switching loyalties to those who detain the client for profit.

Even a duly appointed conservator is barred from placing an incompetent person in a lock-down facility without a court order. Such an order requires clear and convincing proof that such placement is necessary and the least restrictive possible. Probate Code section 2356.5(b). A jury in this case could find that Horswill's actions were not "the least intrusive to the client . . ." Seeking protection for a client is one thing. Depriving the client of the ability to make the most basic of life choices without the required court findings is another.

By refusing to seek court intervention, Horswill remained in control of the situation, in opposition to his client, and collected funds for advising those whose interests were adverse. The facility got money ($6,000 a month), Rolfe charged for his time, Cheski-Hill allegedly stole, and Horswill and Rolfe's attorney took some $50,000 for opposing the client's wishes.

The San Francisco Bar Association opinion also discusses *Caldwell v. State Bar* (1975) 13 Cal. 3d 488. There, the attorney at issue was disciplined for so doing as "it is undisputed that (1) petitioner had no specific authorization from the Tarrs to pay himself fees out of the trust funds whenever he deemed he had earned them, and (2) petitioner never notified the Tarrs, either before or after doing so, of the amounts or times he thus paid himself." Petitioner/Attorney was the trustee there. (*Id*. at 493.)

iii. Breach of Duty of Loyalty

There is also a triable issue of fact as to whether or not Horswill could claim lawful privilege due to the attorney's duty of absolute loyalty to a client, where he advised others to confine his client and take her money for themselves. See *Flatt v. Superior Court* (1994) 9 Cal. 4th 275, 282: "An attorney's duty of loyalty to a client is not one that is capable of being divided, at least under circumstances where the ethical obligation to withdraw from further representation of one of the parties is mandatory, rather than subject to disclosure and client consent." Cordell could not, according to Horswill, give consent to his representation of the trustee and his rendering of advice to the facility confining her against her will. Further, at 283:

> "Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm. If a substantial relationship is established, the discussion should ordinarily end. The rights and interest of the former client will prevail. Conflict would be presumed; disqualification will be ordered."

In *Woods v. Superior Court* (5th Dist. 1983) 149 Cal. App. 3d 931, 932 the question before the Court was this: "The principal issue before us is whether an attorney, who for years has represented the interests of a family corporation, can represent one spouse against the other in an action for dissolution of their marriage when the family corporation is a primary focus of dispute in the dissolution." The answer was a resounding no, even though the evidence presented was resolved by the trial court judge in favor of finding no confidential information had been shared by the wife with the lawyer. "The ethical prohibition against acceptance of adverse employment involving prior confidential information includes potential as well as actual use of such previously acquired information." (*Id*. at 934.)

Whether or not the attorney thought the husband's desires would be in the "best interests" of the wife was not part of the equation.

iv. Horswill's State of Mind

This is a situation where Horswill is testifying as to his own state of mind, to his claimed devotion to his client's best interests and his own alleged ignorance of the law in his asserted area of expertise. Code of Civil Procedure section 437c(e) states, in the last part: "[S]ummary judgment may be denied in the discretion of the court if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or if a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof."

2. Financial Elder Abuse

The 2nd Cause of Action for Financial Elder abuse is based on taking money from Cordell's trust. The discussion above applies to this as well. Horswill took payments from the trust for his work in advising the facility and Rolfe to keep Cordel confined, in opposing Cordell's petition for release, and he advised the trust to pay Somerford and Rolfe, as well as Rolfe's separate counsel. As there are triable issues of fact as to whether or not Cordell was confined without lawful privilege, there are also triable issues of fact as whether Horswill caused and encouraged loss of her trust assets.

3. Negligence

"The elements of a cause of action for legal malpractice are (1) the attorney-client relationship or other basis for duty; (2) a negligent act or omission; (3) causation; and (4) damages. Proof of legal malpractice requires proof not only of negligence by the lawyer but also of causation, a trial within a trial to establish that, but for the lawyer's negligence, the client would have prevailed in the underlying action." *Lombardo v. Huysentruht* (2001) 91 Cal. App. 4th 656, 665 (internal citations omitted).

Counsel Rindlisbacher opines that Horswill committed legal malpractice by failing to represent Ms. Cordell as she requested, and by opposing her request to be released. That is expert opinion contrary to Horswill's position.

Further, "Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process. The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship." *Fremont Indemnity Co. v. Fremont General Corp.* (2006) 143 Cal. App. 4th 50, 63 (internal citations omitted).

Horswill instead advised those opposing Ms. Cordell's desire to be released, while billing Cordell for his services, and authorizing distribution of her assets to those who confined her. The Court is not aware of authority permitting lawyers to sacrifice essential client rights on the basis of what the attorney thinks is best for the client.

Case law, and the bar association opinion relied upon by Horswill, make clear that once an attorney has determined a client is incompetent, that attorney's relationship with the client is terminated, and billing an incompetent client is unlawful. There exists several triable issues of fact as to whether or not Horswill's conduct in this regard was a breach of the duty of loyalty or otherwise negligent.

4. Disputed Issues of Fact

Several of the facts relate Horswill's beliefs or his state of mind. The Court exercises its discretion to ignore them under CCP 437c(e).

Horswill's Fact No. 32 is that he did not act maliciously, fraudulently, or oppressively with regard to Cordell. That is disputed by his own declaration and the exhibits thereto, such as the Power of Attorney for healthcare (Ex. K to Horswill Declaration), the San Francisco State Bar opinion (Exhibit Q to same), paragraph 19 of the Horswill declaration noting Cordell's objection to being confined, and paragraph 3 of same, noting the number of years he practiced in the probate field. It is also disputed by the Declarations of Rolfe and Rindlisbacher and the exhibits thereto.

Fact No. 48 is disputed by paragraph 19 of the Horswill Declaration noting Cordell's objection to being at Somerford, as well as the POA (Exhibit K). It is also disputed by the Rolfe declaration, which confirms Cordell's objection. Fact No. 50 is disputed for the same reasons, as well as the rest of Horswill's and Rolfe's declaration setting forth the advice and assistance Horswill gave to Somerford and Rolfe in keeping Cordell confined. Fact No. 76 is disputed for the same reasons as are Facts Nos. 106. 107, 134, 157, 183, and 213,

Fact No. 82 is disputed by the Rolfe Declaration, and in particular Exhibits D, E, and F thereto, showing Horswill's advice to Rolfe to ignore Cordell's desires, to pay Horswill and Rolfe's attorneys from Cordell's own funds, and the check ledger showing Rolfe did so. Other evidence raising a dispute is paragraph 19 of Horswill's declaration noting the objection by Cordell. Fact No. 84 is disputed for the same reasons, as are Facts Nos. 189 and 191.

Facts Nos. 89. 139, 196, and 246 are disputed by the Horswill, Rolfe, and Rindlisbacher declarations and the Exhibits thereto.

5. Punitive Damages

The above raises triable issues of fact as to whether confinement of Cordell against her will was permitted by law. Horswill claims to be an expert in the probate area, yet claims he relied on a POA that was invalidated when Cordell objected to her confinement. He also claims he relied on a San Francisco Bar Association opinion which requires the "least intrusive" method be used to protect the client, if the attorney choses to attempt such protection. That same opinion cites a case finding that the attorney/client relationship is terminated if the client is incompetent, and another case stating an attorney may not charge an incompetent client fees.

A jury could find that Horswill's claims he acted in a good faith belief that his actions were in Cordell's best interests to be false, and instead find his actions were motivated by the fees. They could also find that the breach of the duty of loyalty was so egregious as to warrant a finding of malicious, fraudulent, or oppressive conduct. Horswill's claim he is an expert in this area of law conflicts with his contention that his conduct was permissible, where the law renders a POA ineffective on patient objection and requires even a conservator to obtain an order placing a dementia patient in a locked facility.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 6/13/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Clovis Coventry Place, LP v. Placencia***

Case No. 15CECL08943

Hearing Date: June 14, 2016 (Dept. 501)

Motion: By Defendant Placencia for Attorney Fees After Trial

Tentative Ruling:

To deny the motion without prejudice unless Defendant can provide the Lease Agreement with the applicable attorney's fees provision at the hearing.

Explanation:

[The Court notes that no opposition appears in the Court's files.]

Defendant has moved for attorney's fees pursuant to Civil Code §1717 after an unlawful detainer trial, which concluded on April 4, 2016. Defendant seeks $1,200.00, which she claims is the maximum allowed under the attorneys fees provision in the lease agreement. Although Defendant quotes the applicable provision from the lease agreement in her motion, Defendant did not attach the agreement. Therefore, the Court cannot determine whether Defendant is actually entitled to the fees sought.

Therefore, the motion for attorney's fees is denied without prejudice, unless Defendant can present the lease agreement at the hearing.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 6/13/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Harpains Meadow v. Stockbridge (and related cross-action)***
Court Case No. 13CECG02711

Hearing Date: **June 14, 2016 (Dept. 501)**

Motion: Cross-Defendants' Motion for Judgment on the Pleadings as to the Second Amended Cross-Complaint

Tentative Ruling:

To grant. Leave to amend is granted only on the condition that cross-complainant also seek rescission of the settlement agreement and release. Cross-Complainants are granted 10 days' leave to file the Third Amended Cross-Complaint. The time in which the Cross-Complaint can be amended will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

Explanation:

All causes of action involved on this motion are claims of fraud in the inducement. As a threshold matter, a cause of action for fraud in the inducement cannot be stated unless rescission of the contract is also sought. Cross-Complainants are clear they are not seeking rescission, but instead are seeking to affirm their rights under the contract. The case of *Village Northridge Homeowners Ass'n v. State Farm Fire and Cas. Co.* (2010) 50 Cal.4th 913 ("*Village Northridge*") is controlling. There, plaintiff had resolved a suit against his insurer by executing a settlement agreement which included a release of all claims against the insurer. The California Supreme Court held that the insured could not pursue damages in a second lawsuit against the insurer under a theory of fraud in the inducement without also rescinding the release. "A settlement agreement is considered presumptively valid, and plaintiffs are bound by an agreement until they actually rescind it." (*Id.* at p. 930.) It noted that the Legislature "has created a fair and equitable remedy to address the alleged fraud problem: rescission of the release, followed by suit...[o]ur statutory scheme…effectively ensures that plaintiffs who may have been defrauded in the settlement process will be allowed access to the courts." (*Id.* at p. 931.)

Cross-complainants attempt to avoid the issue by arguing that the Court in *Village Northridge* did not hold that rescission must be pled "as part of its elements," and they point out that the jury instructions for "misrepresentation" and "false promise" do not include this as a factor. However, this fails to deal with the holding in *Village Northridge*. That holding was not limited to suits between an insurer and its insured, but applies to contracts generally, and especially to settlement agreements and releases. Generally, a party who believes he/she has been fraudulently induced to enter a contract must rescind. (See 5 Witkin, Summary 10th (2005) Torts, § 828, p. 1201 (discussing *Village Northridge*; see also 1 Witkin, Summary 10th (2005) Contracts, § 297, p. 324 (also discussing *Village Northridge*)—"In the usual case of fraud, where the promisor knows what he or she is signing but consent is induced by fraud, mutual assent

is present and a contract is formed, which, by reason of the fraud, is voidable. In order to escape from its obligations, the aggrieved party must rescind by prompt notice and offer to restore the consideration received, if any.")

In *Village Northridge* the court was dealing with a settlement agreement and release of claims (as here), and it noted that with such types of contracts the plaintiff was incapable of following the alternate route of "affirmance of the contract together with suit" (as plaintiffs here argue they can do) because part of the bargained-for agreement had been the release of claims, and the second suit necessarily meant plaintiff was not affirming the release. (*Village Northridge* at p. 924-925, distinguishing *Denevi v. LGCC* (2004) 121 Cal.App.4th 1211.)

Cross-complainants cannot allege a cause of action for fraud in the inducement while not seeking to rescind the settlement agreement and release. These causes of action are subject to judgment on the pleadings on that basis alone, and the court does not reach the other issues.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 6/13/16.
(Judge's initials) (Date)

Tentative Rulings for Department 502

Tentative Rulings for Department 503

(6)

Tentative Ruling

Re: ***Harris Construction Co., Inc. v. Viking Ready Mix Co., Inc.***
Superior Court Case No.: 14CECG02904

Hearing Date: June 14, 2016 (**Dept. 503**)

Motion: Motion for summary adjudication by Plaintiff Harris Construction Co., Inc.

Tentative Ruling:

To deny. The Court sustains the evidentiary objections of Defendant Viking Ready Mix Co., Inc.

Explanation:

The dispute here centers upon what the terms of the contract consist of, and the Court cannot determine what the duties of Defendant Viking Ready Mix Co., Inc. ("Viking") are, unless and until a complete determination of the terms of the contract is resolved, which cannot be accomplished pursuant to this motion.

Plaintiff Harris Construction Co., Inc. ("Harris") contends the form it prepared and referred to in the purchase order only referred to the *specifications* in the Viking purchase order, while Viking contends that all the *terms* in its purchase order were incorporated into the contract as well as the specifications. Although the parties do not agree on the terms of the contract:

> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code. (Cal. U. Com. Code, § 2207.)

The California Uniform Commercial Code also defines what a contract is:

> (12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by this code and as supplemented by any other applicable laws. (Cal. U. Com. Code, § 1201(a)(12).)

Here, disputed facts #15-18 make it clear that the parties do not agree what the express terms of the contract concerning warranties are. Using the interpretive contractual guideposts of California Uniform Commercial Code section 1303 as well

section 2316 concerning creation and exclusion of warranties, as well as any other applicable law as provided under section 1103, subdivision (b), the Court will have to determine what the terms of the contract are first, before it can determine what duties Viking owed to Harris under the contract.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 6/10/16 .
(Judge's initials) (Date)